



# STATE OF INDIANA

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March 16, 2011

Mr. Greg Weaver  
Business Editor, *The Indianapolis Star*  
P.O. Box 145  
Indianapolis, IN 46206-0145

*Re: Informal Inquiry 11-INF-06; Indiana Utility Regulatory Commission*

Dear Mr. Weaver:

This is in response to your informal inquiry regarding the Indiana Utility Regulatory Commission ("IURC"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Indiana Public Access Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.*

On December 10, 2010, you asked the IURC to produce "all reports received by the IURC from Black & Veatch regarding the Edwardsport IGCC [Integrated Gasification Combined Cycle] plant" (the "Reports"). The Reports were prepared in response to the Commission's orders in Cause No. 43114. On December 15th, IURC Assistant General Counsel DeAnna L. Poon informed you that she could not produce the records "because they consist of both trade secrets and deliberative information," and cited to Ind. Code §§ 5-14-3-4(a)(4) and 5-14-3-4(b)(6), respectively, as the statutory bases for the IURC's denial.

On January 5th, you sent a modified request to the IURC requesting portions of the Reports that did not consist of trade secrets or deliberative material. You informed Ms. Poon that you believed the Reports contain factual information that falls outside of the two exceptions to the APRA cited in the IURC's denial of your December 10th request. That same day, Ms. Poon responded to you and attached my advisory opinion in response to a previous complaint from another requester regarding the Reports. *See Op. of the Public Access Counselor 10-FC-295*, available at <http://www.in.gov/pac/advisory/files/10-FC-295.pdf>. In that matter, I opined that the IURC did not violate the APRA by denying access to the Reports under Ind. Code §§ 5-14-3-4(a)(4) and 5-14-3-4(b)(6).

You seek an informal opinion regarding the question of whether or not the APRA requires the IURC to provide you with a redacted copy of the Reports. Specifically, you argue that the IURC should disclose factual material contained within the Reports that is

neither a trade secret nor deliberative material. Moreover, you note that the IURC's denial of access in *10-FC-295* was based on an administrative order by former IURC Administrative Law Judge Scott Storms, who is currently the subject of ethical charges filed by the Indiana Inspector General concerning his alleged negotiations for employment with Duke Energy while continuing to rule on Duke Energy matters pending before the IURC. You argue that "Mr. Storms' entire record on this matter with Duke Energy is tainted and should not be used as a deciding factor by the IURC or your office in deciding which records to release."

On behalf of the IURC, Ms. Poon responded to your inquiry on March 11, 2011. She argues that the IURC's withholding of the entire Reports is appropriate because all of the information in the Reports is either "deliberative or inextricably linked to deliberative material." With regard to the issue of Mr. Storms' involvement in the matter, Ms. Poon states that the IURC's internal audit of Mr. Storms' cases "found no faulty analysis by Mr. Storms in that case." See *Internal Audit of Duke Energy Cases Presided over by Former Administrative Law Judge Storms*, Indiana Utility Regulatory Commission (Dec. 7, 2010), <http://www.in.gov/iurc>. Ms. Poon adds that she and IURC General Counsel Doug Webber conducted their own analysis of the information in the Reports and "independently determined that the records contain trade secrets as defined by Ind. Code § 24-2-3-2."<sup>1</sup>

In your inquiry, you state that the analysis in *10-FC-295* "didn't expressly consider the [APRA's] requirement to redact confidential from disclosable information in a record." Section 6 of the APRA does require that, "[i]f a public record contains disclosable and nondisclosable information, the public agency shall . . . separate the material that may be disclosed and make it available for inspection and copying." I.C. § 5-14-3-6(a). In some cases, however, entire records are deemed confidential under the APRA and no information contained within the record may be disclosed. See, e.g., I.C. §§ 5-14-3-4(a)(9) (patient medical records); 4(b)(1) (investigatory records of a law enforcement agency); 4(b)(5)(A) (records related to negotiations between economic development entities and industrial or commercial prospects); 4(b)(12) (records specifically prepared for discussion or developed during discussion in an executive session); 4(b)(16) (library or archival records); 4(b)(19) (records that, if disclosed, would have a reasonable likelihood of exposing vulnerability to a terrorist attack); 4(b)(23) (certain records requested by incarcerated offenders).

In *10-FC-295*, I concluded that because the Reports contain trade secrets, and because the APRA classifies as confidential "[r]ecords containing trade secrets," I.C. § 5-14-3-4(a)(4) (emphasis added), the IURC acted appropriately by denying access to the Reports. I did not address the need to separate disclosable from nondisclosable material in the Reports due to the provision's wording, which classifies as confidential the record

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<sup>1</sup> Ms. Poon also offered to make these records available to the Office of the Public Access Counselor for review *in camera* to determine the applicability of the cited APRA exemptions. However, the APRA does not permit the public access counselor to conduct such a review. See Ind. Code § 5-14-3-9(h) ("The [reviewing] court may review the public record in camera to determine whether any part of it maybe be withheld under this chapter.") (emphasis added).

containing the trade secret rather than merely the trade secret itself. *Id.* It is unclear why the APRA classifies as confidential entire “[r]ecords containing trade secrets” rather than merely the trade secret information itself, but the language of the statute is clear. When interpreting a statute that is unambiguous, courts give it its clear and plain meaning. *Butler v. Ind. Dep’t of Ins.*, 904 N.E.2d 198, 202 (Ind. 2009) (citing *Bolin v. Wingert*, 764 N.E.2d 201, 203 (Ind. 2002)). “If a statute is unambiguous, we may not interpret it, but must give the statute its clear and plain meaning.” *Id.* (citing *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001)). If the General Assembly had intended for only the trade secrets contained within records to be withheld, the provision could have been worded like another portion of the statute that classifies as confidential “[a] social security number contained in the records of a public agency.” I.C. § 5-14-3-4(a)(12). The wording of that provision suggests that a public agency should release a public record containing a social security number after the agency redacts the social security number. On the other hand, because the APRA classifies “[r]ecords containing trade secrets” as confidential and not only the trade secrets themselves, it is my opinion that subsection 4(a)(4) of the APRA requires the IURC to deny a records request for a record that contains a trade secret.

The next relevant question is whether the Reports do, in fact, contain trade secrets that would require the IURC to withhold them. With regard to that issue, you suggest that the IURC’s determination that the Reports contain trade secrets is undermined by the allegations involving Mr. Storms’ purported conflict of interest. As I noted in *10-FC-295*, Mr. Storms issued the administrative order that determined the Reports contained trade secrets under Ind. Code § 24-2-3-2. As such, I did consider Mr. Storms’ decision as one factor in my opinion in *10-FC-295*. However, Mr. Storms’ order was only one basis for my determination that the records contain trade secrets:

[T]he IURC determined that the information in the Reports consisted of trade secrets. The IURC’s administrative rules govern the submission of confidential or privileged information to the IURC. *See* 170 I.A.C. 1-1.1-4. . . .

Indiana courts have recognized that “the broad grant of regulatory authority given the IURC by the legislature includes implicit powers necessary to effectuate the statutory regulatory scheme.” *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm’n*, 810 N.E.2d 1179, 1184 (Ind. Ct. App. 2004); *Office of Utility Consumer Counselor v. Public Serv. Co. of Indiana, Inc.*, 608 N.E.2d 1362, 1363 (Ind. 1993). The Indiana Court of Appeals has upheld IURC’s administrative orders concerning the confidentiality of alleged trade secret information. *See, e.g., Ind. Bell Tel. Co.*, 810 N.E.2d at 1184; *Cellco P’ship. v. Ind. Util. Regulatory Comm’n*, 810 N.E.2d 1137 (Ind. Ct. App. 2004). . . . Before a court will vacate an IURC order, the petitioner must demonstrate that the order either lacks a factual basis or is contrary to law. *Id.*

The IURC determined pursuant to 170 I.A.C. 1-1.1-4 that the Reports include confidential trade secrets. Nothing before me indicates that the IURC’s decision lacked a factual basis or was contrary to law. *Cellco P’ship.*, 810 N.E.2d at 1142. In fact, the type of information subject to the IURC order (e.g., details of the cost estimate for the IGCC Project and the details of forecasted operations and maintenance expenses of

the IGCC Project) appears to be “information [that] derives independent economic value, actual or potential, from not being generally known” to Duke Energy’s competitors and other entities in the industry that could obtain economic value from its disclosure. I.C. § 24-2-3-2(c)(1) [defining trade secrets]. Moreover, such information is similar to that which has been ruled a trade secret by Indiana courts. *See Infinity Products, Inc. v. Quandt*, 810 N.E.2d 1028, 1032 (Ind. 2004), *trans. denied* (manufacturing costs, blueprints and price summaries); *Kozuch v. CRA-MAR Video Center, Inc.*, 478 N.E.2d 110, 113-14 (Ind. Ct. App. 1985), *trans. denied* (customer list of names not able to be created by means outside the business operations of the list owner). Further, the IURC order noted that Duke Energy entered into a confidentiality agreement with Black and Veatch to ensure the nondisclosure of the IGCC Project information, which indicates that the information was “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” I.C. § 24-2-3-2(c)(2). In my opinion, the Reports appear to contain information that falls within the definition of a trade secret under I.C. § 24-2-3-2(c). Because the APRA classifies as confidential “[r]ecords containing trade secrets,” I.C. § 5-14-3-4(a)(4), the IURC did not violate the APRA by denying your request.

*Op. of the Public Access Counselor 10-FC-295* (emphasis added). While I recognize and appreciate the *Indianapolis Star’s* concerns regarding Mr. Storms’ involvement in this matter, I still have no specific information before me that demonstrates his decision regarding the confidentiality of the Reports “lacked a factual basis or was contrary to law.” *Cellco P’ship. v. Ind. Util. Regulatory Comm’n*, 810 N.E.2d 1137, 1142 (Ind. Ct. App. 2004). As Ms. Poon notes, the IURC conducted an audit of Mr. Storms’ cases and “found no faulty analysis” in Mr. Storms’ order. Moreover, Ms. Poon and Mr. Webber determined independently that the Reports contain trade secrets as defined by Ind. Code § 24-2-3-2. Based on the IURC’s audit and review of Mr. Storms’ decision and the above analysis from *10-FC-295*, it remains my opinion that the IURC may not release the Reports because they are “[r]ecords containing trade secrets,” which the APRA classifies as confidential in Ind. Code § 5-14-3-4(a)(4).

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,



Andrew J. Kossack  
Public Access Counselor

cc: DeAnna L. Poon